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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 418

FEDERAL POWER COMMISSION, PETITIONER

v.

STATE OF WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 22, 1953.[1]

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit (R.

[1] Petitions for writs of certiorari seeking review of the judgment of the Court of Appeals have already been filed by Phillips Petroleum Company (No. 280, this Term) and by State of Texas and the Railroad Commission of Texas, Corporation Commission of Oklahoma and State of New Mexico and Oil Conservation Commission of New Mexico (No. 281, this Term).

VI 1855–1873) are reported at 205 F. 2d 706. The opinion of the Federal Power Commission (R. V 1682–1755) is reported at 90 PUR (NS) 325.

JURISDICTION

The judgment of the Court of Appeals was entered May 22, 1953 (R. VI 1875). By order of the late Chief Justice Vinson dated August 20, 1953, the time within which to file a petition for a writ of certiorari was extended to and including October 19, 1953. The jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act (15 U. S. C. 717r (b)) and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Phillips Petroleum Company produces or purchases in the field natural gas which it moves in a network of pipelines to processing plants which are also in the field. At these plants, the gas is commingled, processed, and, within a few hundred feet or yards of the plants, sold by Phillips to pipeline companies, which, in turn, transport the gas in interstate commerce and resell it in the consumer markets. The question presented is whether, on these facts, the Federal Power Commission is barred from deciding that, by virtue of the exemption contained in Section 1 (b) of the Natural Gas Act for "the production or gathering of natural gas," Phillips' sales are excluded from the Commission's regulatory jurisdiction.

STATUTE INVOLVED

The pertinent provision of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 56 Stat. 83, 15 U. S. C. 717 *et seq.*) is as follows:

SEC. 1. * * *

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

On October 28, 1948, the Federal Power Commission instituted an investigation to determine whether Phillips Petroleum Company is a "natural-gas company" within the meaning of the Natural Gas Act, and if so, whether any of its rates, subject to the Commission's jurisdiction, are unjust or unreasonable (R. V 1647–1650).[2]

[2] There were several intervenors in the administrative proceedings. The cities of Detroit, Michigan; Kansas City, Missouri; and Milwaukee, Wisconsin; Wayne County, Michigan, as well as the State of Wisconsin and its Public Service Commission, intervened in support of Commission jurisdiction, participated in the proceedings below and constitute the respondents here. The States of Arkansas, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, and Texas, or

On April 16, 1951, the Commission limited the hearings then being held to the question of Phillips' status under the Natural Gas Act, deferring the remaining issues to subsequent hearings (R. V 1671–1676). At the close of the hearing[2] the Commission granted an unopposed motion for omission of the intermediate decision procedure (R. V 1680–1681), and, after receiving briefs and hearing oral argument, issued its opinion and order, determining that Phillips was not a natural-gas company within the meaning of the Act and terminating the rate investigation (R. V 1682–1753). Their petitions for rehearing having been denied (R. V 1836), the intervenors favoring Commission jurisdiction instituted proceedings for review in the court below (R. I 1–72) in which Phillips and other opponents of jurisdiction intervened (R. I 72–117). The Court of Appeals, Judge Clark dissenting, reversed (R. VI 1855–1875).

Phillips' Operations. The pertinent facts as to Phillips' operations may be summarized as follows: Phillips is a large integrated unit, engaged in virtually every phase of the petroleum indus-

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their agencies, as well as several royalty owners associations intervened in opposition to Commission jurisdiction (R. V 1686–1687). The States of Texas, Oklahoma and New Mexico and their agencies participated below and as already noted, *supra*, p. 1, have filed a petition for a writ of certiorari.

[2] The resulting record comprised almost 5,000 pages of testimony and nearly 4,000 pages of exhibits.

try and owning properties in the Mid-Continent, Missouri, West Texas, and New Mexico, Rocky Mountain and Gulf Coast areas (R. III 849–862; V 1687). As of December 31, 1949, Phillips owned or controlled by contract 15.22 trillion cubic feet of proven gas reserves (R. V 1689). In connection with its natural gas business, it also owned, in April 1950, approximately 4,380 miles of gathering, residue, and other gas lines in Arkansas, Kansas, Oklahoma, Texas, and New Mexico (R. V 1689). In addition, it owned and operated 25 natural gas plants, 19 in Texas, 4 in Oklahoma, and 2 in New Mexico, as well as owning part interest in 10 other plants, 3 of which it operates (R. V 1689).

Phillips sold over 400 million mcf of natural gas in 1949 and about 500 million mcf in 1950 (R. V 1689). About 50% of the gas so sold is purchased from other producers (R. III 855), and a substantial portion is casinghead gas, *i. e.*, produced from wells in conjunction with oil (R. IV 1328, 1358, 1388, 1420). Between 50% and 60% of the natural gas sold by Phillips is sold to interstate pipeline companies with none of which Phillips is affiliated (R. III 1053, 1070; V 1689). The purchasing companies transport and resell the gas to consumers and local distributing companies in fourteen states ranging from California to Michigan, Minnesota, Ohio, and Wisconsin (R. V 1690, 1827–1834).

Once the gas which is ultimately sold to the five natural-gas companies comes from the well-head, it typically flows into and through one of Phillips' nine pipeline systems to one of ten processing plants in the field. Each system consists of a network of converging pipelines of progressively larger size by means of which the gas is moved to the processing plants. At the processing plant, the extractable products and impurities are removed and the gas further processed to comply with the specifications of the particular sales contract involved. Thereafter, the gas is carried a few hundred feet or yards, depending on the particular case, to sales meters within or just outside the plant enclosure, where it is delivered to the purchaser who then transports it across state boundaries to the States where it is ultimately resold and consumed (R. V 1691–1711).

Opinion of the Commission. On the basis of the voluminous record before it, the Commission concluded that, although Phillips' activities were undoubtedly in interstate commerce, the sales and transportation came "within Section 1 (b)'s ban prohibiting application of the Act's provision to 'production or gathering'" (R. V 1740–1741), and that Phillips therefore was not a "natural-gas company" within the meaning of Section 2 (6) of the Act (R. V 1752–1753).

Opinion of the Court of Appeals. The Court of Appeals for the District of Columbia Circuit in a 2–1 decision reversed the Commission and

ruled that "the Commission should fix the rates at which [Phillips'] sales are made" (R. VI 1865). The court held that the sales took place "after the time and beyond the place at which production and gathering are complete and after processing has intervened" (R. VI 1857).

REASONS FOR GRANTING THE WRIT

1. The question presented by this case is whether independent producers and gatherers of gas in the field who sell directly to interstate pipeline companies at the point where gathering is complete are, by reason of such sales, subject to regulation under the federal Natural Gas Act. No such company has ever been regulated under the Act, as the Commission has never considered that its jurisdiction extended so far.[4] To the contrary, the Commission has presumed that the authority to control the producers and the gatherers rests in the producing states, whose regulations, primarily for purposes of conservation, protect both the national and the local interests.

[4] It has been estimated that there are approximately 2300 producers and gatherers selling to the 140 companies classified by the Commission for administrative purposes as "natural gas companies." See R. II 728–729; Federal Power Commission Statistics of Natural Gas Companies (U. S. G. P. O., 1951) pp. 501–502. It has been also estimated that there are approximately 8000 independent producers of natural gas in the United States. See Natural Gas Investigation, Federal Power Commission, Docket No. G–580, Report of Commissioners Smith and Wimberley, U. S. G. P. O. (1948), p. 194.

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Obviously, such a question, which would mandatorily bring within the Commission's jurisdiction this whole segment of the natural gas industry, is of great importance in the administration of the Act.

Moreover, whether the Federal Power Commission has the authority to regulate sales by gatherers, and thereby to subject the gatherers to the general provisions of the federal statute, manifestly presents an issue of major importance, not only to the industry and the Commission, but also to large sections of the public, which is the ultimate consumer of the gas gathered by these companies. There would seem to be little doubt but that this is a question of such national importance as to warrant the consideration of this Court.

2. The court below erred in ordering the Commission to assume jurisdiction over Phillips Petroleum Company. Both the legislative history of the Natural Gas Act, and familiar principles of deference to the administrative construction of the statute which the administrative body charged with its enforcement has applied, persuasively point to the error of the court below.

(a) The language of the statutory exemption is "production or gathering." Finding that these words were not "so plain and unambiguous as to provide a positive answer" to the problem present (R. V 1712, 1713), the Commission first turned to the history of the statute.

As appears from § 1 (a), the Natural Gas Act stemmed from the 1935 report of the Federal Trade Commission dealing with the necessity of correcting through regulation the evils resulting from the monopolistic practices of the interstate pipeline companies.[5] The evils portrayed did not in any way relate to independent producers and gatherers or their prices; on the contrary, the report depicted such groups as needing protection against the interstate pipeline companies (see, *e. g.*, S. Doc. No. 92, 70th Cong., 1st Sess., Pt. 84–A, pp. 132–133, 590, 602, 608–611). The purpose of the Natural Gas Act was to provide the requisite protection by providing for federal regulation of these interstate transportation companies. *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U. S. 591, 610.

In the hearings on H. R. 11662, 74th Cong., 2d Sess., "an earlier bill substantially similar to the Natural Gas Act" (*Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 505, fn. 7), Dozier DeVane, the Commission's Solicitor, explicitly stated in a brief submitted on the bill's constitutionality:[6]

> The bill makes no attempt to regulate the production or gathering facilities of a

[5] S. Doc. No. 92, Pt. 84–A, Final Report, Federal Trade Commission to the Senate, pursuant to S. Res. 83, 70th Cong., 1st Sess.

[6] Hearings before a Subcommittee of the House Committee on Foreign and Interstate Commerce, on H. R. 11662, 74th Cong., 2d Sess., p. 17.

> natural-gas company, this function being purely local in character * * *.

And he orally testified:[7]

> Mr. COLE [Member of Committee]. Does this bill give anywhere the Commission power over the source of natural gas in the different fields in a manner which we might call comparable to that which your Commission now has over hydro-electric generating plants?
>
> Mr. DEVANE. It does not; no, it *does not attempt to regulate the gathering rates or the gathering business.* * * *. [Italics supplied.][8]

Mr. DeVane further testified, in passages quoted by the Commission at R. V 1716, that the Commission was not to have authority over the rate charged by a company owning a gas supply to a company transmitting it to another state. The various committee hearings and reports, as well as the debates, contain numerous references to the fact that the intent of the legislation was, on the one hand, to regulate the interstate pipeline companies, *i. e.,* those engaged in the transporting of gas from the producing fields to consumer markets, including their sales made in the course of such transportation and, on the other, not to

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[7] *Id.* at p. 34. See, also, pp. 28, 42–43, 72.

[8] This Court has quoted these excerpts as material to the intended scope of the production and gathering exemption. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 505, fn. 7.

regulate any of the activities of independent producers and gatherers.[9]

(b) The Commission then reviewed its own prior administrative construction which, of course, is entitled to great weight.[10] As stated in the Commission's opinion, "in no case in its history has this Commission held that the Act gives it jurisdiction over a company solely by reason of its movement of gas in interstate commerce or sales in interstate commerce for resale, where such movement or sales take place in the process of production or gathering" (R. V 1720–1721). Moreover, in 1940, scarcely two years after the Act was approved, and at a time when four Commissioners who had been in office both when the Act was passed and while predecessor bills were under Congressional consideration were still members of the Commission, the Commission held that it had no jurisdiction under the Natural Gas Act over sales by independent producers or gatherers of natural gas. *Columbian Fuel Corporation,* 2 F. P. C. 200. Since that

[9] See Hearings on H. R. 11662, 74th Cong., 2d Sess., pp. 17, 27–34, 39, 55–57, 61–62, 80–83, 85, 95–97, 150–159; H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1–2; Hearings on H. R. 4008, 75th Cong., 1st Sess., pp. 24, 43–45, 48–52, 69, 70, 99, 103–105, 108, 112–113, 121–122; H. Rep. No. 709, 75th Cong., 1st Sess., p. 2; 81 Cong. Rec. 6721–6723, 9312–9315.

[10] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549; *United States* v. *Public Utilities Commission*, 345 U. S. 295, 314–315.

time, the Commission has in numerous cases adhered to this construction of the Act.[11]

Significantly, in the case principally relied on by the court below and respondents, *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, this Court stated with respect to the doctrine of the *Columbian* case (691 n.) that:

> We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases.

This would seem clearly to indicate that the Court in *Interstate* thought that the question presented by the *Columbian* case, which is the question in-

[11] See *Billings Gas Co.*, 2 F. P. C. 288 (1940); *Interstate Natural Gas Co., Inc.*, 3 F. P. C. 416 (1943); *The Fin-Ker Oil and Gas Production Co.*, 6 F. P. C. 92 (1947); *The Chicago Corporation*, 6 F. P. C. 98 (1947); *Kansas-Nebraska Natural Gas Co., Inc.*, 6 F. P. C. 664 (1947); *J. R. and D. E. Whelan*, 6 F. P. C. 672 (1947); *Hassie Hunt Trust*, 6 F. P. C. 835 (1947); *Sinclair Prairie Oil Co.*, 6 F. P. C. 1059 (1947); *LaGloria Corporation*, 7 F. P. C. 349 (1948); *Superior Oil Company*, 7 F. P. C. 627 (1948); *General Crude Oil Company*, 7 F. P. C. 1024 (1948). See, also, the Commission's Order No. 139, August 7, 1947, Docket No. R–106 (12 Fed. Reg. 5585) announcing that the Commission would "* * * construe the exemption contained in Section 1 (b), to the effect that the provisions of the Act shall not apply to the 'production or gathering' of natural gas, as including arm's-length sales of natural gas by independent producers and gatherers, made during the course or upon completion of production and gathering." In the light of the President's veto of H. R. 1758, 80th Cong., 2d Sess. (the House version of the so-called Kerr bill) and the pendency of the proceeding against Phillips, the Commission rescinded Order No. 139 by Order No. 154, issued July 11, 1950 (15 Fed. Reg. 4633). R. V 1728; see, also, R. V 1812, note 51.

volved in this case, differed from that then before it, and that it reserved that point for further consideration if and when necessary.

(c) As we show below (*infra* pp. 15–18), no decision of this Court required the Commission to find coverage in this case. Absent such judicial compulsion, it was obviously open to the Commission to use its own expert judgment in applying the statutory standard of "production or gathering" to the facts of the case. Where the question "is one of the specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially,"[12] the Court has often held that the administrative agency—familiar with the background of the legislation and the subject matter to be regulated, charged with the responsibility for administering the statute, and informed by practical experience in administration of the statute—is uniquely qualified. The reviewing court's function is then limited to determining whether the agency's findings have warrant in the record as a whole and a reasonable basis in law.[13] These cases are fully applicable here, since

[12] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131.

[13] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 153–154; *Gray* v. *Powell*, 314 U. S. 402, 412–413; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145–146; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 260; *Cardillo* v. *Liberty*

the Commission's role in determining the meaning of "production or gathering" is certainly no different from that of the agencies in the case cited in note 13, where coverage depended on the meaning of the terms "employee," "labor dispute in active progress," "producer" of coal, corporate "control," "member of a crew," injury "in the course of employment," and "bituminous coal." The principle of those cases has special force where, as here, Congress has not defined the critical statutory terms. Furthermore, where a term like "gathering" is used, which has a specialized meaning in an industry, determination of the coverage of the Act may depend upon appraisal of evidence as to what that specialized meaning is (*O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 371; *Order of Conductors* v. *Swan*, 329 U. S. 520, 525).

In these circumstances, the court below should have recognized that, since the Commission's ruling relates to a close question as to the application of the exemption on a matter peculiarly within the Commission's expertise, the Commission's order was not to be set aside unless unsupported by adequate evidence or without a reasonable basis in the law. The Commission's ruling complied fully with these requirements, for not only do the various legal materials to which summary reference has been made support

Mutual Co., 330 U. S. 469, 477–479; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 399.

the Commission's result, but its findings relevant thereto are supported by ample evidence.

3. (a) The court below reversed the Commission principally because it believed the Commission's determination to be inconsistent with this Court's decisions in *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, and *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682. In the *Colorado* case, however, this Court held only that in determining the rate base for gas sold by a pipeline company *after* transmission in interstate commerce, the Commission could (but was not required to) take into account the cost of the company's producing and gathering operations. There was no regulation of sales to the pipeline at the termination of the gathering process.

The *Interstate* decision, which is closer to the case at bar, did not require the result reached by the court below. In that case, Interstate was admittedly, apart from the sales in question, a company subject to the Act—a fact which the Commission has consistently treated as significant in the *Columbian* and subsequent cases. (See p. 11 and fn. 11, p. 12, *supra.*) Indeed, this Court's reference to the *Columbian* case, quoted at p. 12, *supra,* indicates that it was not rejecting the validity of the *Columbian* doctrine. Furthermore, the sales in the *Interstate* case were made out of an interstate transmission line, used to carry gas to consuming markets, not at the imme-

diate end of the gathering process. See *Interstate Natural Gas Co.*, 3 F. P. C. 416, 420. Moreover, in the *Interstate* case, the company, at the same time that it contested federal jurisdiction, was denying the State of Louisiana's power to regulate the transactions in question. See 331 U. S. at 687, n. 9. Indeed, the Court regarded as "a matter of some significance" (p. 692) that there was no evidence or suggestion by the State of any present or indicated conflict between state and federal activity if the Federal Power Commission's jurisdiction were upheld.

(b) As additional basis for its decision, the court below held that the Commission had misinterpreted the statement in the *Interstate* opinion (p. 690), that the gathering exemption applied "where sales * * * are made during the course of production and gathering *and* are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, * * *." [Italics added.] The court emphasized that in its finding at R. V 1752–1753, the Commission, substituting "or" for "and", concluded that Phillips' sales, "constitute a part of its gathering business, *or* they are incidents of or activities related to such business." But at R. V 1745, the Commission made the finding in the conjunctive, stating unequivocally that "these sales are made 'during the course of pro-

duction and gathering.' *And* we expressly find that they are so closely connected with the local incidents of that process as to render rate regulation by this Commission inconsistent or a substantial interference with the exercise by the affected states of their regulatory functions." [Italics added.]

Further, this Court's language in the *Interstate* case, as well as in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 506, suggests that the gathering exemption covers not merely the physical processes but "incidents connected with" (*ibid.*) gathering. It was not unreasonable, therefore, particularly in the light of the legislative history referred to above, for the Commission to regard the sale at the immediate end of gathering as such an incident, rather than as an aspect of the subsequent transportation.

(c) The court below erred also in its view that the sales in question here fell within the regulatory gap which the Natural Gas Act was designed to fill. The cases which denied to the States power over the interstate transportation and sale of gas and electricity (*Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83) involved sales made in the course of interstate transportation by the interstate transmitting companies, not sales by independent producers and gatherers to such companies at the culmination of

production or gathering. Neither the cases before the enactment of the Natural Gas Act[14] nor those since[15] suggest that the absence of State power related to the situation presented here.

CONCLUSION

Since the question presented by this case is of major importance, and the Commission's decision is fully warranted under the statute, this case is one in which certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

OCTOBER 1953.

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[14] Cf. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, 211–212; *Lindsey* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

[15] *Cities Service Gas Co.*, v. *Peerless Oil & Gas Co.*, 340 U. S. 179; *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190.

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